

BOARD OF APPEALS CASE NO. 5522	*	BEFORE THE
APPLICANTS: Milton & Jean Gholston	*	ZONING HEARING EXAMINER
REQUEST: Variance to permit an addition within the required 35 foot rear yard setback in the R3 District	*	OF HARFORD COUNTY
	*	
HEARING DATE: February 22, 2006	*	

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ZONING HEARING EXAMINER'S DECISION

The Applicants, Milton Gholston, Jr., and Jean S. Watson Gholston, are requesting a variance pursuant to Section 267-36B, Table V, of the Harford County Code, to permit an addition to encroach the 35 foot rear yard setback (31 foot proposed) in the R3 District.

The subject property is located at 313 Joppa Crossing Way, Joppa, Maryland 21085, in the First Election District, and is more particularly identified on Tax Map 64, Grid 3F, Parcel 0162, Lot 104. The parcel contains approximately 6,751 Square feet.

The Applicant, Milton Gholston, Jr., appeared, and testified that he and his wife, the Co-Applicant, Jean S. Watson Gholston, are the owners of the subject property. He stated that he had read the Department of Planning and Zoning Staff Report, and had no changes or corrections to that information contained therein.

The witness indicated that after obtaining a permit approximately two years ago he constructed a 16 foot by 17 foot deck on the rear of his home. He and the Co-Applicant later inquired of the Department of Planning and Zoning what would be required should they desire to enclose the existing deck to create a screened in porch. He stated they were advised by the Department that they could build a screen porch without obtaining a variance. They subsequently constructed a screened in porch on the existing deck, and are now requesting a variance so that the porch can be converted into a sunroom. According to Mr. Gholston, his property is currently improved by a single family home with an attached rear deck and an attached rear screen porch.

Case No. 5522 – Milton & Jean Gholston

The witness then described several photographs designated as Attachments 8A - 8E of the Department of Planning and Zoning Staff Report. According to the witness, the two photographs on the left side of Attachment 8A show the front of his home. He indicated that the utility box on the bottom left photograph is not located on his property. The bottom left photograph on Attachment 8B shows the underside of his deck. The single picture on the right side of that Attachment shows the back of a nearby home with an addition similar to the one which he recently constructed.

According to the witness, the two photographs on the left side of Attachment 8C depict what he described as a sunroom attached to the back of his home. The single photograph on the right side of that page shows the corner of his existing deck. The two photographs on the left side of Attachment 8D show different views of the attached sunroom, while the single photograph on the right side of that page shows the corner of his existing deck. Finally, the witness testified that the bottom left photograph on Attachment 8E shows the underside of his deck and sunroom.

Mr. Gholston, testified that the builder constructed his home five to six feet behind the front setback line. He also stated that the house is placed further back from the property line than other houses on his street and in his neighborhood. He pointed out that this placement can be seen on the aerial photograph designated as Attachment 9 to the Department of Planning and Zoning Staff Report. The Applicants' home is visible at the center of that Attachment, and can be identified by the large brown deck attached to the rear of his home. The witness stated that this photograph was taken before his deck was enclosed. He further stated that the home's placement behind the setback line was probably not connected to the placement of the utility box along the front portion of his property. That box is actually located more on his neighbor's side of the property line than on his. Other than the home's placement on the lot, Mr. Gholston indicated that there is nothing else really unique about his property.

The Applicant testified that he is proposing to convert the screen porch which he has already constructed, into a sunroom, by replacing the existing screens with windows. The sunroom would extend four feet into the required 35 foot rear yard setback. The outside wall of the existing structure is 31 feet from the rear property line at its closest point.

Case No. 5522 – Milton & Jean Gholston

According to Mr. Gholston, the granting of the requested variance will not have any adverse impact on neighboring properties. The addition enhances the value of his home, and the structure is compatible with both the existing home and with other houses in the community. The witness further testified that there are many other sunrooms in the neighborhood identical to the one which he has already constructed. Further, his Homeowners Association pre-approved his plans for the existing structure

Mr. Anthony McClune, Deputy Director, Department of Planning and Zoning appeared and testified regarding the findings of fact and recommendations made by that agency. Mr. McClune stated that the Department investigated the request, and visited both the property and surrounding Joppa Crossing Subdivision. He testified that the Department found nothing unique about the subject property. He also indicated that although the rear yard does slope sharply downward from the house to the rear property line, that same slope is found on all other lots in that section of the community. Mr. McClune further testified that the Applicants' house is actually constructed only 3 feet behind the required front setback line, and that it is setback roughly the same distance as all of the other dwellings on that street.

According to Mr. McClune, the structure constructed by the Applicants is definitely not a screened in porch. Neither is it a sunroom, which he defined as a roof enclosed by walls of glass. Rather, he indicated that as shown in the photographs designated as Attachments 8C to the Staff Report, the structure is actually an addition with a roof, walls, siding, windows, and a fully finished interior.

The witness further testified that the only permit which Applicants ever requested for the property was a permit to construct a deck. That permit was granted. Upon request, the Applicant could also have gotten a permit to build a screen porch without a variance. However, such a structure would have consisted only of a roof and open screening. Neither a sunroom, nor an addition of the size actually constructed could have been built at the subject location without first obtaining a variance.

Case No. 5522 – Milton & Jean Gholston

Mr. McClune acknowledged that the subject property does have drainage and utility easements on three sides, but stated that all of the lots in the Applicants' neighborhood are subject to the same easements. He stated that the easements are centered on the property line, so that there is actually a 5 foot easement running along each property line. In addition, the witness indicated that the referenced easements do not affect the lot's buildable area.

The witness also acknowledged that neither a sunroom, nor the existing addition would have any adverse impact on adjoining properties, and that there are other homes in the neighborhood with similar additions. However, he indicated that none of those structures required variances to build. Finally, the witness reiterated that the Department had determined that there was nothing unique about the subject property, and that it had therefore recommended denial of the subject application. Mr. McClune was asked on cross-examination why the Applicants' drawing for a proposed screen porch and addition was not contained in the Planning and Zoning file. He replied that he had reviewed the entire file, and that the Department has no record of any application other than the original request for a deck permit.

The Applicant, Mr. Gholston, testified on rebuttal that on the date when he applied for the original variance he also applied for a permit to build a screen porch. He stated that at that time he brought in pictures of what he intended to build, and was told by the Department of Planning and Zoning that it was acceptable to build the proposed structure, as long as he installed screens where the existing windows are now located. He also stated that he has been a licensed contractor for 20 years, and that he definitely obtained a permit to build a screened in porch on the rear of his home. He then reiterated that the structure which he had constructed was actually a screened in porch with windows.

No witness appeared in opposition to the requested variance.

Case No. 5522 – Milton & Jean Gholston

CONCLUSION:

The Applicants, Milton Gholston, Jr., and Jean S. Watson Gholston, are requesting a variance pursuant to Section 267-36B, Table V, of the Harford County Code, to permit an addition to encroach the 35 foot rear yard setback (31 foot proposed) in the R3 District. Section Harford County Code Section 267-36B, Table V: Design Requirements For Specific Usage in an R3 District, provides for a minimum 35 foot rear yard depth.

Section 267-11 of the Harford County Code permits the granting of variances, stating:
"Variances from the provisions or requirements of this Code may be granted if the Board finds that:

- (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.
- (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest."

The facts of this case are clear. The Applicants constructed an addition onto the rear of their home without first obtaining a permit. One need only view the photographs designated as Staff Report Attachments 8C and 8D to ascertain that what the Applicants constructed can not be viewed as anything other than an addition, complete with a roof, windows, and siding to match the rest of the home. By no stretch of the imagination can it be found that the standard size windows inserted in the walls somehow convert the structure from an addition to a screened in porch. There were no photographs introduced depicting the inside of the completed structure. However, the Hearing Examiner has no reason to disbelieve Mr. McClune's undisputed testimony that the inside is actually an interior room, complete with finished walls, electricity, ceiling fans and window blinds.

Case No. 5522 – Milton & Jean Gholston

Unfortunately, the Applicants chose a location for the subject addition that encroaches into their rear yard setback. The Hearing Examiner, while not insensitive to the potential impact on the Applicants, must examine this case as if the addition were not already erected, and the Applicants were seeking to locate an as yet unbuilt addition at the subject location.

The Maryland Court of Special Appeals set forth a two prong test for determining whether a variance should be granted in the case of *Cromwell v. Ward*, 102 Md. App. 691, (1995). This test can be summarized as follows. First, there must be a determination as to whether there is anything unique about the property for which the variance is being requested. A lot is unique if a peculiar characteristic or unusual circumstance, relating only to that property, causes the zoning ordinance to impact more severely on the property than on surrounding parcels. *Cromwell, supra*, at 721. Only if the subject property is unique, may the hearing examiner proceed to the second prong of the test. That prong involves a determination as to whether literal enforcement of the zoning ordinance, with regard to the unique property, would result in practical difficulty or unreasonable hardship to the property owner.

Therefore, in evaluating the subject application, the Hearing Examiner first must determine whether the subject property is unique. Uniqueness has been found by the Maryland Court of Appeals in situations where “...the property whereon structures are to be placed (or uses conducted) is, in and of itself, unique and unusual in a manner different from the nature of the surrounding properties” *Cromwell, supra* at 691.

The only evidence produced by the Applicants that there is anything different or unusual about their property was Mr. Gholston’s testimony that the builder constructed their home 5 to 6 feet behind the front setback line. He stated that this caused the house to be set back further than other homes on the street. With the exception of that one fact, Mr. Gholston affirmatively stated that there was nothing else really unique about his property. Mr. McClune, on the other hand, testified that Applicants’ home is actually only 3 feet behind the required front setback line, and that it is roughly the same distance from the front property line as all of the other houses on the street.

Case No. 5522 – Milton & Jean Gholston

Assuming for the sake of argument that the Applicant's testimony is correct, that fact alone would not make his property unique from a zoning perspective.

“In the zoning context, the unique aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. Uniqueness of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls. *North v. St. Mary's County*, 99 Md. App. 502, 512, 638 A.2d 1175 (1994)”

The Staff Report does indicate that the subject property slopes sharply downward from the house toward the rear property line. However, the slope of the subject parcel is no different than the slope found on other properties in the neighborhood. In fact, a review of the photographs designated as Staff Report Attachments 8B and 8 D clearly shows that all other properties in the immediate vicinity of the subject parcel have similarly sloping rear yards. In addition, even if they did not, the sloping rear yard did not impact the placement of the addition constructed by the Applicants in this case

For the reasons set forth above, the Hearing Examiner concurs with the Department of Planning and Zoning, that the subject property is not unique as that word is intended within the context of zoning law. It is true that it would be difficult and costly to remove a four foot section from the back of an already completed addition. However, in *Cromwell, supra*, the Court made it clear that, "[s]elf-inflicted or self-created hardship is never considered proper grounds for a variance. Where an Applicant creates a non-conformity, the Board lacks the power to grant a variance." The Court went on to say, "It is not the purpose of the variance procedures to effect a legalization of a property owner's intentional or unintentional violation of the zoning requirements."

Case No. 5522 – Milton & Jean Gholston

In *Cromwell, supra*, the aforesaid reasoning was applied to a building constructed higher than the permit allowed, even though the height listed on the permit was unintentionally written incorrectly. However, this rationale has also been applied by the Maryland Courts in denying a gazebo located in a critical area inadvertently. *North, supra* 99 Md. App. 502, 638 A.2d 1175 (1994); and a swimming pool within the critical area placed there unintentionally and without knowledge of the critical area location, *White v. North*, 121 Md. App. 196, 708 A.2d 1093 (1998).

While the Hearing Examiner finds the result unfortunate, the hardship created in this case was of the Applicant's own making and can not be legitimized through the zoning process absent the necessary findings required by Harford County Code Section 267-11 that the Applicants' property is unique. Therefore, the Hearing Examiner recommends that the subject Application be denied.

Date MARCH 24, 2006

REBECCA A. BRYANT
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on APRIL 21, 2006.